

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
PHILLIPS PROPERTY
NEW ORLEANS DISTRICT
FILE NUMBER MVN-2011-03181-SK
DATE: 24 October 2012**

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: Ms. Amanda Phillips, landowner

Authority: Clean Water Act (33 USC 1344 et seq.)

Date Approved Jurisdictional Determination (AJD) and Notice of Appeal Rights were provided to the Appellant: March 29, 2012

Receipt of Request for Appeal (RFA): May 29, 2012.

Date Administrative Record (AR) was received: June 15, 2012

Summary of Decision: The Appellant is challenging the New Orleans District's (District) AJD which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over wetlands located on a property identified as Lot 8 on and to the north of Rucker Road, near Madisonville, in St. Tammany Parish, Louisiana. The RFA challenged the AJD on the basis that the District incorrectly applied law, regulation or officially promulgated policy, and omitted material facts when identifying federal CWA jurisdiction over wetlands on the subject property. The Appellant cited three reasons for the appeal as follows (summarized from the RFA):

1. The Appellant believes the District omitted material facts regarding the roadside ditches which bound property to the north and south. More specifically, these ditches limit overland sheet flow from traveling beyond the roadways; the ditches do not have relatively permanent flow, and therefore should not be considered wetlands.
2. The Appellant believes the District incorrectly applied law, regulation or officially promulgated policy when it determined that the wetland was adjacent to a water of the United States (WOUS) by incorrectly classifying the connection between the wetland and the WOUS.

3. The Appellant believes the District incorrectly applied law, regulation or officially promulgated policy when it determined that the property meets the requirements of the significant nexus due to the remote connection of property to the non-RPW East Bedico Creek as described in the determination.

The merit of each reason for appeal was evaluated separately as discussed below, recognizing however that there is interconnectivity between an omission of material fact and the overall significant nexus evaluation. As a result the first and third reasons for appeal were found to have merit and are remanded to the District for additional analysis and documentation.

The second reason for appeal was found to have no merit and no further action is required.

Background Information: The project site is located near Madisonville, in Section 7, Township 7 South, Range 10 East, St. Tammany Parish, Louisiana.

The overall size of the site in question is approximately 5.06 acres. The District determined the site contains 2.89 acres of wetlands that are adjacent to a tributary of Bedico Creek, the nearest Traditionally Navigable Water (TNW). From the site water flows through two tributaries (an unnamed tributary that is not a relatively permanent water (RPW), and East Bedico Creek that is an RPW). The District's rationale supporting the conclusion that the wetlands are "adjacent" is (See Approved Jurisdictional Determination Form dated March 22, 2012, Section III):

"Wetlands on the project site and in the review area will provide storm water retention and floodwater storage and do have a capacity to remove pollutants from upland runoff before pollutants reach the tributary system and the TNW. The non-RPW offsite appears to be capable of accelerated flow, as evidence by stacking of debris within the channel, which will carry pollutants/sediments to downstream RPW and eventually to the TNW. The wetlands will contribute nutrients and detritus to downstream foodwebs. Additionally, these wetlands will be utilized by wildlife (mammals, birds, amphibians, reptiles, etc.) for their life processes. In summary, the project area wetlands in combination with the offsite non-RPW and similarly situated wetlands provide a direct and acute contribution to the chemical, physical, and biological makeup of the TNW. "

The AR for this action includes location maps, a JD letter and approved JD form, a Notification of Administrative Appeal Options and Process (NAO/NAP) and Request for Appeal Form, an Administrative Tracking Sheet, the JD Request letter, form and additional information; previously issued JD letters, aerial photographs, a hydrologic unit code (HUC) map, Light Detection and Ranging (LIDAR) images, U.S. Natural Resources Conservation Service (NRCS) soil survey map and additional information, precipitation data, wetland delineation data sheets including Global Positioning System (GPS) plots and drainage area images, information on similarly situated wetlands, and title pages of technical references.

Chronology:

7 December 2011 - The District Office received a request from Ms. Amanda Phillips for an updated 'wetlands determination' for her property located in Madisonville, LA. The request letter indicated that a previous AJD for this property expired in June of the current year. The request letter also referenced the [Rapanos] Supreme Court decision and resultant changes in wetland jurisdictional determinations, and questioned whether the roads to the north and south of the subject property have affected natural drainage for the property. Attached to the request letter was a Request for Wetland Determination Form, and a copy of the Department of the Army jurisdictional determination letter dated 30 June 2005, MVN-2005-2278-SK.

18 January 2012 - The District visited the site to confirm the presence of wetlands it had initially identified from aerial photography and other references (NRCS soil maps, HUC, LIDAR images, etc). Field data sheets, *Wetland Determination Data Form-Atlantic and Gulf Coastal Plain Region*, recorded wetland characteristics found on the subject property and were entered into the AR.

22 March 2012 - The District completed their CWA jurisdictional evaluation of wetlands on the subject property, as recorded on the *Approved Jurisdictional Determination Form, U.S. Army Corps of Engineers*.

29 March 2012 - The District provided a letter to Ms. Phillips in response to the request for JD, stating that a portion of her property was subject to CWA jurisdiction. The letter included unspecified 'enclosures'.

29 May 2012 - The Mississippi Valley Division received from Ms. Phillips a Request for Appeal (RFA) form, with a cover letter, dated 9 May 2012. The RFA cover letter identified three reasons for appeal.

1 June 2012 - The Appeal Review Officer (RO) notified Ms. Phillips that the initial evaluation of the RFA indicates her request satisfied the criteria for appeal, and that her appeal was acceptable. The RO provided a copy of the RFA and cover letter to the District, via electronic mail. The RO also sent an electronic mail request to the District to provide a copy of the AR to both the RO and Ms. Phillips.

15 June 2012 - The RO and the Appellant received copies of the AR from the District via email.

24 July 2012 - A meeting and site visit was attended by the RO (Hoffman), the Appellant (Ms. Phillips), and the District (Mr. Windham and Mr. Heffner). The RO provided a written Agenda prior to the meeting, which identified reasons for appeal, and points needing clarification in the AR.

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL REVIEW:

The Division Engineer has the authority to hear the appeal of this JD.¹ However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, because that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

¹ 33 C.F.R. § 331.3(a)(2).

The District provided a copy of the AR to the RO and the Appellant on June 15, 2012. The AR is limited to information contained in the record by the date of the NAO/NAP form, which in this case is dated March 29, 2012.

A site visit and informal meeting was held on July 24, 2012. The site visit and informal meeting was attended by Ms. Amanda Phillips, Appellant, Mr. Michael Windham, MVN Regulatory Project Manager, Mr. Robert Heffner, MVN Chief of Enforcement and Compliance Section, and Ms. Mary J. Hoffman, NWD RO. The site visit consisted of a tour of the site to inspect the general character of the area. The informal meeting consisted of clarification of the Appellant's reasons for appeal, and the District's clarification of rationale used in the AJD and AR.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE NEW ORLEANS DISTRICT ENGINEER (DE) :

REASON 1: The Appellant believes the District omitted material facts regarding the roadside ditches which bound the property to the north and south. More specifically, the Appellant argues that these ditches limit overland sheet flow from traveling beyond the roadways; the ditches do not have relatively permanent flow, and therefore should not be considered wetlands.

FINDING: This reason for appeal has merit.

ACTION: The RFA is being remanded to the District for further evaluation, analysis, and documentation.

DISCUSSION: The RFA states that the roadside ditches limit any overland sheet flow from traveling beyond the roadways, and do not carry a relatively permanent flow, and therefore should not be considered wetlands. A reference was made to the June 2007² EPA and USACE 'Clean Water Act Jurisdiction' publication regarding 'ditches' in the RFA.

Ms. Phillips first mentioned in her letter, dated December 5, 2011, requesting an updated wetlands/jurisdictional determination, that she believed that the roads to the north and south of her property may have affected drainage on her property, and that the recent [Rapanos] Supreme Court decision may have affected the previous [jurisdictional] determination. This letter is included in the AR on page 21.

² The RFA referenced a 'June 2005' EPA/USACE CWA guidance. The referenced document was verified with the Appellant, and the date of the document was updated here from June 2005 to 'June 2007'.

On June 5, 2007, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) issued joint agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* ("Rapanos"). In response to comments received, the agencies provided revised guidance on December 2, 2008, which remains the most current and in effect.³

The 2008 guidance states: "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402)."⁴

Further, the regulations state that, 'Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.'⁵ As referenced in the 2008 CWA guidance, wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a significant nexus with a TNW.

There is no reference in the AR that indicates whether the District evaluated the roadside ditches located to the north and south borders of the property for CWA jurisdiction. During the July 24, 2012 site visit with the RO, the District PM verified

³ This guidance 2008 CWA guidance is intended to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the *Rapanos* decision and provide effective protection for public health and the environment. It may be referenced at: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>, or http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

⁴ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*.

⁵ 33 CFR 328.3(c)-definition of *adjacency*. "The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

that indeed they had not addressed these ditches in the JD, but pointed out the presence of culverts that lie beneath the roadway/driveway (located along the north boundary of property), and that the culverts convey water flow into the unnamed tributary (non-RPW) of East Bedico Creek (RPW). However, the AR does not contain information regarding the presence of the road, culverts or roadside ditch.

Ms. Phillips' question of how the water would reach the unnamed tributary via overland sheetflow when there is a road and ditch that lies between the property and the creek is valid. The District's description provided on the approved JD form, that the general flow relationship involves 'overland sheetflow' from the 'site wetlands northwest within non-RPW down sloping gradient to East Bedico Creek' does not sufficiently address this question. It does not mention the presence of the road or the roadside ditch, or whether the overland sheetflow may concentrate and flow through the culverts into the non-RPW. In summary, the District did not address Ms. Phillips' specific question regarding the roadside ditches in either the AJD form, or the District's JD response letter to Ms. Phillips, dated March 29, 2012 (AR page 5).

I find that this reason for appeal has merit, and is remanded to the District for further evaluation, analysis, and documentation. It is recommended that the District Engineer evaluate the presence of the road, culverts, and roadside ditches address whether the hydrologic connection between the subject wetlands and the unnamed tributary (non-RPW) may be separated from jurisdictional waters by manmade features, and whether the presence of these manmade features (i.e., ditches, culvert, roads, etc) affect, or sever, federal jurisdiction.

REASON 2: The Appellant believes the District incorrectly applied law, regulation or officially promulgated policy when it determined that the wetland was connected, or adjacent, to a water of the United States. More specifically, the Appellant believes the District did not correctly classify the connection between the wetland and the WOUS.

FINDING: This reason for appeal does not have merit

ACTION: No further action is required.

DISCUSSION: In the RFA Ms. Phillips referenced the AJD form, which stated the wetland is connected through an "ephemeral

flow" which "will occur from wetland to non-RPW following rain events". The RFA further states:

"This flow is characterized as "overland sheetflow" which travels from site wetlands northwest within non-RPW down sloping gradient to East Bedico Creek. These types of flow would be contradictory since to have an ephemeral flow you would need an ephemeral stream. By USACE regulatory definition, an ephemeral stream is "flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above water table year-round." There is no indication of an ephemeral stream bed between the property in question and East Bedico Creek as the surrounding property located above Hough Rd, the bounding road to the North, is heavily wooded. Additionally, there is no definable bank or ordinary high water mark (OHWM), both of which are required to properly define a stream as recommended by regulatory guidance by both the USACE and EPA. Additionally, you cannot have overland sheetflow if you are also to have a stream bed in order to have ephemeral flow. Therefore, I believe this connection is incorrectly classified."

The Corps and EPA, continue to assert CWA jurisdiction over wetlands adjacent⁶ to traditional navigable waters. The JD Guidebook states that "under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters'.⁷

The District indicated in the AJD form that the subject wetlands are physically connected through ephemeral overland sheetflow which travels from the site wetlands northwest to the non-RPW, and [following a] down sloping gradient to East Bedico Creek [RPW] (AR page 11). The District's use of the word 'ephemeral' in this context was in reference to duration of the flow in that it lasted only for a short time following rain events. The

⁶ 33 CFR 328.3(c)-definition of *adjacency*.

⁷ EPA/Army Corps., Clean Water Act Jurisdiction, Dec. 2, 2008, see http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

District stated that the connection between the subject wetlands and the offsite unnamed tributary (non-RPW), was via 'overland sheet flow', and did not imply the presence of a 'stream' (with bed and banks) at this location.⁸ The District clarified evidence of overland sheet flow during the appeal site visit as leaf litter and rack lines. Further, the AR indicates biological characteristics of the wetlands' adjacency in that the subject wetland is a mixed pine savannah hardwood flats that provides a diverse aquatic and wildlife habitat for large and small mammals, birds, amphibians, reptiles, and insects, and crustaceans. The District observed deer tracks, rabbit droppings, numerous bird species, and crawfish mounds (AR page 11).

As discussed in the preceding paragraphs, the AR provided sufficient basis to support use of terminology (ephemeral, overland sheetflow) to describe the periodic short-lived surface connection between the subject wetlands and the unnamed tributary (non-RPW), and the AR provided sufficient basis to support a determination of adjacency through a hydrologic, and biologic connection to the tributary of Bedico Creek. As a result, I find that this reason for appeal does not have merit.

REASON 3: The Appellant believes the District incorrectly applied law, regulation or officially promulgated policy when it determined that the property meets the requirements of the significant nexus due to the remote connection of property to the non-RPW East Bedico Creek as described in the determination.

FINDING: This reason for appeal has partial merit.

ACTION: The RFA is being remanded to the District for further evaluation, analysis, and documentation.

DISCUSSION: In the RFA, the Appellant indicates that she believes the property does not meet the requirements of the significant nexus due to the remote connection of property to the 'non-RPW East Bedico Creek' as described in the determination. Further, that the property's situation within

⁸ The RFA's suggestion that 'you cannot have overland sheetflow if you are also to have a stream bed in order to have ephemeral flow' is flawed. By definition, overland sheet flow occurs over plane surfaces at the head of the watershed. Due to surface irregularities, sheet flow will eventually transition to shallow concentrated flow, typically referred to as a 'rill' or small channels. The ephemeral nature of flowing water can be applied to a number of naturally occurring geomorphic features occurring within a watershed including, but not limited to overland sheet flow, rills, gullies, swales, or stream channels. Additional information regarding sheetflow, and other water features, can be found in: Liopold, L. B., 1997, *Water, Rivers and Creeks*, University Science Books, 39-41pp

Flood Zone C poses a limited likelihood of the wetland's utility for flood storage, pollutants and sediments and diminishes the definition of adjacent as developed in *Rapanos v United States*.

The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (Guidebook)⁹ indicates principal considerations when evaluating significant nexus include, but are not limited to, the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. It instructs field staff to consider all available hydrologic information (e.g., gauge data, flood predictions, historical records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM with a channel defined by bed and banks. The Guidance recognizes that as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have significant nexus rather than a speculative or insubstantial nexus with a TNW.

The District utilized aerial photography, Light Detection And Ranging (LIDAR) imagery, two previous AJDs for the Appellant's property, two AJDs for two similarly situated wetlands, and a site visit as supporting information for its AJD. The District compiled wetland evaluation data sheets (AR pages 74-79) which recorded their findings to support and confirm the presence of wetlands on the subject property in accordance with current federal CWA standards¹⁰. Finally, the District applied regulations and agency guidance¹¹ as documented in the AR on the AJD form (AR pages 7-15).

The AR included sufficient documentation regarding precipitation, volume, and frequency (AR pages 72, 9, 11, and 12) to support the District's conclusion that the significant nexus between the subject property wetlands in combination with the non-RPW, and similarly situated wetlands within the watershed of Bedico Creek (TNW) is more than speculative. The AJD form discusses the biological, chemical, and physical functions being performed in Section III(B), documents the

⁹The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* is used as the U.S. Army Corps of Engineers Regulatory Program Standard Operating Procedures for conducting an approved jurisdictional determination evaluation and the documenting practices to support an approved jurisdictional determination.

¹⁰The *1987 Corps of Engineers Wetlands Delineation Manual*, and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*

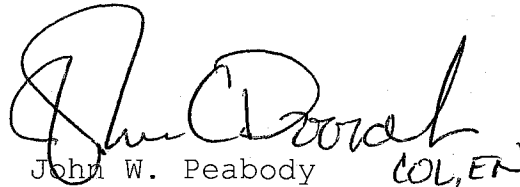
¹¹ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*.

District's Significant Nexus Determination in Section III(C)(2) and references additional research and analysis to support its findings in Section IV(B) (AR pages 7-15).

However, as discussed above in the paragraphs under Reason 1, the District did not include an evaluation, or documentation in the AR, of the manmade structures (roads, roadside ditches, and culverts) which may or may not affect connectivity between the subject wetlands, and the non-RPW. Without this evaluation and documentation, the significant nexus determination provided in the AR page 12 is incomplete.

As a result, I have determined that this reason for appeal has merit, and is remanded to the District for further evaluation and documentation.

OVERALL CONCLUSION: After reviewing and evaluating the RFA, the District's AR, and the recommendation of the RO, I find that this appealed jurisdictional determination has partial merit in that one of the three reasons for appeal was found to have no merit, and the remaining two of the three reasons have merit. As a result, this appeal is remanded to the District for further analysis and documentation of the two reasons determined to have merit. The final Corps jurisdictional decision will be made by the New Orleans District Engineer pursuant to my remand.



FOR

John W. Peabody COL, EN
Major General, U.S. Army
Commanding